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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GERALD SCARPELLI,

Petitioner,

vs.

UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the decision of the United States Court of Appeals for the Seventh Circuit interpreting the dangerous special offender provision, 18 U.S.C. § 3575, in a case of first impression, to not require the sentencing judge to make an independent finding of dangerousness and specialness before imposing increased punishment is an important question of federal law which should be settled by this Court.

2. Whether the decision of the United States Court of Appeals for the Seventh Circuit upholding the use of the preponderance of the information standard to enhance punishment by up to twenty-five years under 18 U.S.C. § 3575 violates the Due Process Clause of the Fifth Amendment to the United States Constitution and is in conflict with this Court's decision in *Specht* v. *Patterson*, 386 U.S. 605 (1967).

3. Whether the decision of the United States Court of Appeals for the Seventh Circuit that enhanced sentencing under the dangerous special offenders sentencing provision can be imposed on a finding that a defendant had been convicted three times before over a twenty-year time span without examining the details of those crimes is an important question of federal law which should be settled by this Court.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Prayer	1
Opinions Below	2
Jurisdiction	2
Constitutional Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	3
Conclusion	11
Appendix:	
A.—Order of the United States Court of Appeals dated June 7, 1984	App. 1a
B.—Order of the United States Court of Appeals denying petition for rehearing with *en banc* suggestion dated July 3, 1984.	App. 15a

TABLE OF CASES

	PAGE(S)
Specht v. *Patterson*, 386 U.S. 605 (1967)	6, 7, 8
United States v. *Bowdach*, 561 F.2d 1160 (5th Cir. 1977)	7
United States v. *Neary*, 552 F.2d 1184 (7th Cir. 1977)	4, 6, 7
United States v. *Schell*, 692 F.2d 672 (10th Cir. 1982)	5, 7, 8, 9
United States v. *Stewart*, 531 F.2d 326 (6th Cir. 1976)	7, 8
United States v. *Warme*, 572 F.2d 57 (2nd Cir. 1978)	5, 10
United States v. *Williamson*, 567 F.2d 610 (4th Cir. 1977)	7
Williams v. *New York*, 337 U.S. 241 (1949)	7, 8

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PRAYER

Petitioner, GERALD SCARPELLI, respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The order of the United States Court of Appeals for the Seventh Circuit appears in Appendix A, attached hereto. The order of the United States Court of Appeals for the Seventh Circuit denying a petition for rehearing *en banc* appears as Appendix B, attached hereto.

JURISDICTION

The opinion and judgment of the United States Court of Appeals was entered on June 7, 1984. Petitioner filed a petition for rehearing with *en banc* suggestion, which was denied in an order entered on July 3, 1984. This petition is filed within 60 days of said order of the United States Court of Appeals for the Seventh Circuit, and jurisdiction is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person shall ... be deprived of life, liberty or property, without due process of law; ..."

STATEMENT OF THE CASE

In January, 1983, Petitioner was charged in a one-count indictment with violating 18 U.S.C. § 922(h) and 924(a) which prohibit a convicted felon from receiving a firearm which had been transported in interstate commerce. The Government filed a petition for dangerous special offender sentencing, which they subsequently amended. Petitioner entered a plea of guilty pursuant to a written plea agreement, under the terms of which the Petitioner and the Government agreed that an appropriate

disposition was a sentence of not less than three years and not more than seven years imprisonment. The maximum sentence under 18 U.S.C. § 924(a) is five years imprisonment. In order to impose a sentence in excess of five years, then, the court was required to make a finding that Petitioner was a dangerous special offender as delineated under 18 U.S.C. § 3575.

On September 26, 1983, a hearing was held on the Government's amended petition for sentencing as a dangerous special offender. Prior to the hearing Petitioner and the Government entered into stipulations wherein a synopsis of testimony by various individuals was presented to the court with the understanding that the parties agreed as to the substance of that testimony. The stipulations did not include an agreement that such testimony, however, was credible. In addition, certain exhibits were presented to the court prior to the hearing which consisted of various police reports, none of which named the Petitioner. The trial judge, after stating that he had read the Government's petition and most of the supporting documents as well as Petitioner's memorandum in opposition, made a finding that Petitioner was a dangerous special offender and sentenced him to seven years imprisonment.

REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Appeals for the Seventh Circuit interpreting the dangerous special offender provision, 18 U.S.C. § 3575, in a case of first impression, to not require the sentencing judge to make an independent finding of dangerousness and specialness before imposing increased punishment is an important question of federal law which should be settled by this Court.

18 U.S.C. § 3575 establishes an enhanced sentencing scheme for defendants deemed dangerous special offenders.

Defendants found to come within the enhanced sentencing scheme are exposed to a potential sentence of up to twenty-five years incarceration. 18 U.S.C. § 3575(b).

As a prerequisite to finding a defendant within the ambit of Section 3575, the Government has the burden of establishing that the defendant is both a special offender, as defined by Section 3575(e), and a dangerous offender, as defined by Section 3575(f). The Government must prove that the defendant fits within both definitions prior to the imposition of dangerous special offender status. If the Government fails to prove either of those elements, then dangerous special offender enhanced sentencing cannot be imposed on the defendant.

In *United States* v. *Neary*, 552 F.2d 1184 (7th Cir., 1977), the court examined the constitutionality of the sentencing provision contained in 18 U.S.C. §3575. In analyzing the statutory language, the court stated:

> "Under the present language, it seems clear, that the maximum specified in the statute defining the offense is still the maximum for all cases unless separate and further factual determinations are made under section 3575. Additional factual determinations of 'special' and 'dangerous' must be made after a verdict of guilty to support the imposition of a sentence greater than the sentence normally applicable to the crime."

552 F.2d at 1192-1193. Section 3575(b) provides in pertinent part that: "The court shall place in the record its findings, including an identification of the information relied upon in making such finding and its reasons for the sentence imposed." On appeal, the reviewing court is to examine whether the procedure employed was lawful, whether the findings were clearly erroneous, or whether the sentencing court's discretion was abused. 18 U.S.C. § 3576.

In the case at bar, Petitioner received a sentence greater than the sentence permitted for the offense to which he pled guilty. The sentencing court in imposing a greater sentence did

not make an independent determination that Petitioner was both a special offender and a dangerous offender. The sentencing court's rationale for imposing the enhanced sentence was as follows:

> The things that impressed me unfavorably, I might say, making me feel that the defendant is a special dangerous offender is the fact that he has not two but three prior convictions . . . Although I think the three prior convictions are sufficient to justify the sentence in view of the circumstances of the crime and the background of the defendant in this particular case. Without that, I mean, without anything more, a seven year sentence would be consistent with the objectives of the statute and the nature of the offense, in other words not disproportionate in severity to the maximum term otherwise authorized by law for the felony . . . I think the Government's recommendation and agreement in this case is very realistic under all the circumstances and that it should be adopted."

The United States Court of Appeals for the Seventh Circuit, in affirming the imposition of dangerous special offender sentencing status on Petitioner, decided, in an issue of first impression, that the sentencing court is not required to independently delineate its reasoning in finding a defendant to be both a special offender and a dangerous offender. Order, page 10.

The sentencing court's determination and United States Court of Appeals conclusion that three prior convictions warrant the imposition of special dangerous offender status on a defendant, is in error. The dangerous special offender provisions do not simply delineate a habitual offender sentencing scheme. A court may not properly deem a defendant "dangerous" simply because multiple convictions make the defendant a special offender. *United States* v. *Warme*, 572 F.2d 57 (2nd Cir., 1978). As the court noted in *United States* v. *Schell*, 692 F.2d 672, 675 (10th Cir., 1982), prior convictions may support a finding of dangerousness only after examining other evidence of the defendant's character and prior conduct.

The factors which must be considered and placed into the record in determining dangerousness include a defendant's past record, the probation officer's report, the nature of the present offense, and the defendant's attitude. *United States* v. *Neary,* 552 F.2d 1184 (7th Cir., 1977). Not once in the instant record did the sentencing court state any reasons for finding that Petitioner would pose such a threat to society in the future as to warrant the imposition of a period of incarceration greater than statutorily provided for the underlying felony. Indeed, the sentencing court glossed over the facts of the underlying offense by merely stating that the "defendant brought this matter on himself." Nor did the sentencing court undertake an examination of the facts underlying each of defendant's three prior convictions, which spanned a twenty-year period.

The United States Court of Appeals decision that a separate determination of dangerousness is not required by 18 U.S.C. § 3575 prior to imposition of an aggravated sentence is contra the express language of the statute and legislative history of the statute. Further, on one hand the court's conclusion that a separate determination is not required is undercut by the court's admonition to trial courts, on the other hand, that they should articulate their findings as clearly as possible to insure that individuals sentenced under Section 3575 are adequately apprised of the reasons for such sentencing. Order, page 10, n.4.

The decision of the United States Court of Appeals for the Seventh Circuit upholding the use of the preponderance of the information standard to enhance punishment by up to twenty-five years under 18 U.S.C. § 3575 violates the Due Process Clause of the Fifth Amendment to the United States Constitution and is in conflict with this Court's decision in *Specht* v. *Patterson,* 386 U.S. 605 (1967).

The preponderance of the information standard in Section 3575(b) has been challenged on numerous occasions, and the court of appeals which have addressed the issue have upheld the standard. See *United States* v. *Schell*, 692 F.2d 672 (10th Cir., 1982); *United States* v. *Neary*, 552 F.2d 1184 (7th Cir., 1977); *United States* v. *Bowdach*, 561 F.2d 1160 (5th Cir., 1977); *United States* v. *Williamson*, 567 F.2d 610 (4th Cir., 1977); and *United States* v. *Stewart*, 531 F.2d 326 (6th Cir., 1976). However, the constitutionality of the preponderance of the information standard has not been addressed by this Court.

The Fifth Amendment to the United States Constitution provides, in pertinent part, that no person shall be deprived of life, liberty, or property, without due process of law. One of the fundamental protections afforded under the Due Process Clause is the reasonable doubt standard, which protects the accused against conviction except upon proof beyond a reasonable doubt. The separate and additional fact finding which must be made before the sentencing court may impose dangerous special offender status triggers the protections of the Due Process Clause, which requires the use of the reasonable doubt standard. Petitioner urges that the analyses of the courts upholding the standard are in error and are in conflict with this Court's decision in *Specht* v. *Patterson.*

One of the first cases to address whether the preponderance of information standard violates due process is *United States* v. *Neary*, 552 F.2d 1184 (7th Cir., 1977). In *Neary*, the court stated that a finding of dangerous offender entails an evaluation of a defendant's character and a prediction of future conduct, which are matters traditionally left to the wide discretion of the sentencing court. 552 F.2d at 1193. Relying generally on this Court's decision in *Williams* v. *New York*, 337 U.S. 241 (1949), the court concluded that greater procedural protections, such as the beyond a reasonable doubt standard of proof, are not constitutionally required. Similarly,

the court of appeals in other circuits also relied on this Court's decision in *Williams* v. *New York* to conclude that the beyond a reasonable doubt standard is not applicable under Section 3575. Petitioner respectfully urges that reliance on *Williams* v. *New York* in this instance is misplaced. *Williams* dealt solely with the use of presentence reports in an *ordinary* sentencing proceeding as opposed to an *enhanced* sentencing proceeding. Instead, Petitioner urges that the analysis by this Court in *Specht* v. *Patterson* is more appropriate. In *Specht,* this Court expressly stated that "We decline the invitation to extend (*Williams* v. *New York*) to this radically different situation" in which the defendant was faced with an *enhanced sentence* based on a dangerousness finding authorized by the Colorado Sex Offenders Act. 386 U.S. at 608 (emphasis added). This Court in *Specht* held that due process safeguards must be adhered to when a "new charge leading to criminal punishment" is made in an enhanced sentencing proceeding. 386 U.S. at 610-611. Certainly the foremost of due process safeguards is the reasonable doubt standard.

Section 3575 is not simply a habitual offender provision, a concept which is embodied in the definition of special offender under Section 3575(f). *United States* v. *Stewart,* 531 F.2d at 333. Section 3575 requires that the sentencing court make an additional determination of dangerousness. Section 3575(b); *United States* v. *Schell,* 692 F.2d at 676. Unlike other sentencing determinations, a court sentencing under Section 3575 must place in the record its findings, including an identification of the information relied upon in making such findings, and its reasons for the sentence imposed. Further, the statute requires a hearing before the court can render a decision which may subject the defendant to a longer sentence than otherwise authorized. The additional required findings of fact distinguishes proceedings under Section 3575 from ordinary sentencing proceedings.

The safeguards afforded under Section 3575 are inadequate to assure fundamental fairness when a sentence is enhanced based on alleged criminal behavior for which a defendant has not been charged unless the allegations are measured on a reasonable doubt standard. The preponderance of the information standard indicates that litigants should share equally the risk of error because the interests at stake have roughly equal importance. *United States* v. *Schell,* 692 F.2d at 676. The proposition that a defendant should share equally the risk of error when being deprived of liberty for a greater period than otherwise authorized violates fundamental principles embodied in the Fifth Amendment. That proposition is particularly offensive in a situation such as the situation presented in the case at bar where the Government listed a series of crimes in the petition for dangerous special offender sentencing for which Petitioner was not charged, much less questioned, and for which he was not even named during any of the stages of investigation. Petitioner urges this Court to examine the court of appeals decision upholding the preponderance of the information standard under Section 3575 in light of the Due Process Clause to the Fifth Amendment and this Court's prior decisions.

The decision of the United States Court of Appeals for the Seventh Circuit that enhanced sentencing under the dangerous special offenders sentencing provisions can be imposed on a finding that a defendant has been convicted three times before over a twenty year time span without examining the details of those crimes is an important question of federal law which should be settled by this Court.

The Seventh Circuit Court of Appeals concluded that under case law and Senate Report 91-617, 91st Congress, 1st Sess., 166 (1969) the sentencing court did not err in holding that the Petitioner was a dangerous special offender solely on the basis of his three prior, separate and distinct felony convictions. The conclusion of the Seventh Circuit Court of Appeals, however, is wholly at odds with the sentencing scheme

as outlined under Section 3575, which requires a separate determination of dangerousness and specialness, and is also wholly unsupported by any case law. Interestingly, the Seventh Circuit in announcing that conclusion, failed to cite any specific case. In addition, that conclusion is at odds with the decision in *United States* v. *Warme*, 572 F.2d 57 (2nd Cir., 1978) that as the dangerous special offender sentencing provisions delineate more than a habitual offender sentencing scheme, a court may not deem a defendant dangerous simply because of multiple convictions. The sentencing court must examine other facts in addition to the mere facts of prior convictions.

The harm created by the decision of the Seventh Circuit Court of Appeals, which erodes the safeguards outlined by Section 3575, is clear in the case at bar. In addition to the bare facts of three prior convictions, the sentencing court was inundated with accusations allegedly made by dead informants and individuals who had no personal knowledge that Petitioner committed other crimes. The accusations, which were contained in stipulations, were for crimes Petitioner was never even questioned about. The reports of investigation which underlay the stipulations notably did not mention Petitioner. The fact of three prior convictions over a twenty year period, even when buttressed by stipulations which contained unreliable allegations and rank hearsay, were totally insufficient to find that a longer period of incarceration was required. Notably, the Government in this case obtained an aggravated sentence of seven years on a crime which ordinarily is brought under 18 U.S.C. Appendix 1, Section 1202, which has a maximum sentence of two years imprisonment.

The conversion of Section 3575 into a recidivist statute by the United States Court of Appeals for the Seventh Circuit is unsupported by any authority. The derogation of Section 3575 into a recidivist statute is an important question of federal law which should be addressed by this Court.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that this Honorable Court issue its writ of certiorari to review the judgment and order of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 35

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Argued March 29, 1984

June 7, 1984

Before

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. THOMAS E. FAIRCHILD, Senior Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 83-2754 *vs.*

GERALD SCARPELLI,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois Eastern Division.

No. 83 CR 16
Thomas R. McMillen, *Judge.*

ORDER

The defendant-appellant, Gerald Scarpelli, a convicted felon, pled guilty to the charge of possessing a firearm in violation of 18 U.S.C. §§ 922(h), 924(a). He was sentenced to seven years imprisonment pursuant to 18 U.S.C. § 3575 which allows a court to impose an increased sentence upon individuals found to be "dangerous special offenders." On appeal, Scarpelli challenges: (1) the constitutionality of 18 U.S.C. § 3575, (2) the adequacy of the sentencing court's findings under that section, and (3) the court's consideration of hearsay evidence in its determination of whether there was sufficient evidence to sentence him under § 3575. We affirm.

I.

After the defendant was charged with the firearms offense, the government petitioned the court for dangerous special offender sentencing pursuant to 18 U.S.C. § 3575. The petition alleged that the defendant had three prior felony convictions, the most recent occurring in July of 1979, and had been imprisoned for one or more of those convictions. In addition to his three convictions, the petition alleged that Scarpelli had participated in a number of other crimes, including six murders, two armored car robberies, approximately twenty burglaries and various other offenses. The defendant ultimately pled guilty to the firearms charge pursuant to a written plea agreement that provided for "a sentence of incarceration to be determined by the Court of not less than three (3) years and not more than seven (7) years if it appears that the defendant is a dangerous special offender, or not more than five (5) years if it does not so appear." The plea agreement also recited that:

> "The defendant and the government have stipulated what the testimony of the witnesses would be at the sentencing hearing including on the government's Amended Petition For Dangerous Special Offender Sentencing. In so stipulating, the defendant understands that at a hearing on the Amended Petition For Dangerous Special Offender Sentencing, the defendant is entitled to assistance of counsel, compulsory process and cross-examination of such witnesses as appear at the hearing."

Thus, the agreement recited the procedural protections to which the defendant would have been entitled had he not agreed to the stipulations. On July 5, 1983, the court accepted the defendant's plea of guilty pursuant to his plea agreement.

In support of its petition for increased sentencing, the government filed nine stipulations with the court for its consideration prior to sentencing. Six of those stipulations contained evidence from various law enforcement officers and agents, two

others contained information from individuals in the Witness Protection Program and one consisted of a statement from the defendant. To support the information contained in the stipulations, the government also provided the court with various exhibits including the defendant's FBI "Rap" sheet, his Chicago Police Department record, certified copies of his three felony convictions, and several police reports relating to other crimes in which Scarpelli allegedly had been involved.

At the September 26, 1983 sentencing hearing, the court found that Scarpelli was indeed a "dangerous special offender" and sentenced him to a period of seven years of incarceration, an enhancement of two years over the maximum penalty provided for a conviction under 18 U.S.C. §§ 922(h), 924(a). The court ruled that "the three prior convictions are sufficient to justify the sentence in view of the circumstances of the crime and the background of the defendant in this particular case." It then went on to discuss the evidence contained in four of the nine stipulations, stating that those four stipulations were the only stipulations it relied upon. The court noted, however:

> "If I ignore all of the statements or stipulations that I have already mentioned, I think that there is sufficient evidence or adequate—more than adequate evidence in the record to impose an additional two years over the maximum for the crime in which he has pleaded guilty and likewise that [the sentence] should be consecutive to the sentence which he is now serving in state custody."

The defendant appeals his sentencing as a dangerous special offender.

II.

Our scope of review of a sentence imposed under 18 U.S.C. § 3575 has been delineated by Congress as follows: "Review of the sentence shall include review of whether the procedure

employed was unlawful, the findings made were clearly erroneous, or the sentencing court's discretion was abused." 18 U.S.C. § 3576. With this standard in mind, we now address the defendant's contentions.

Scarpelli initially challenges the constitutionality of 18 U.S.C. § 3575. In pertinent part, § 3575 provides:

> "If it appears by a *preponderance of the information*, including information submitted during the trial of such felony and the sentencing hearing and so much of the presentence report as the court relies upon, that the defendant is a dangerous special offender, the court shall sentence the defendant to imprisonment for an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felony."

18 U.S.C. § 3575(b)(emphasis added). Scarpelli argues that the "preponderance of the information" standard enunciated in § 3575(b) violates the Due Process Clause of the Fifth Amendment because a standard of proof less than "beyond a reasonable doubt" should not be used to deprive him of liberty. Contending that the Supreme Court has not yet examined the statute's constitutionality, the defendant essentially urges us to mandate the "beyond a reasonable doubt" standard of proof.[1]

Our court addressed this issue in *United States* v. *Inendino*, 604 F.2d 458 (7th Cir.) (per curiam), *cert. denied*, 444 U.S. 932 (1979), a case the defendant has failed to cite in his brief. In *Inendino*, our court refused to accept an argument "that Section 3575 is constitutionally infirm because the statute authorizes findings of fact 'by [the] preponderance of the information,' rather than by the constitutionally mandated standard of beyond a reasonable doubt." 604 F.2d at 463. Responding to the defendant's contention, the court recognized that § 3575:

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[1] The Supreme Court has upheld the Dangerous Special Offender Statute on double jeopardy grounds. *United States* v. *DiFrancesco*, 449 U.S. 117 (1980).

> "does not create a separate criminal charge but instead provides for the enhancement of the penalty for the defendant's criminal conviction. Also, the courts of appeals have uniformily found that the proof of dangerousness by a preponderance of the information is constitutional. *United States* v. *Williamson*, 567 F.2d 610 (4th Cir. 1977); *United States* v. *Bowdach*, 561 F.2d 1160 (5th Cir. 1977); *United States* v. *Stewart*, 531 F.2d 326 (6th Cir.), *cert. denied*, 426 U.S. 922, 96 S.Ct. 2629, 49 L.Ed.2d 376 (1976). *See generally United States* v. *Neary*, 552 F.2d 1184 (7th Cir.), *cert. denied*, 434 U.S. 864, 98 S.Ct. 197, 54 L.Ed.2d 139 (1977)."

Id. Since our court's *Inendino* decision, an additional two circuits have upheld the use of the preponderance of the information standard in the determination of whether a defendant is a dangerous special offender as defined in 18 U.S.C. § 3575. *See United States* v. *Schell*, 692 F.2d 672 (10th Cir. 1982); and *United States* v. *Davis*, 710 F.2d 104 (3d Cir.), *cert. denied*, ____ U.S. ____, 104 S.Ct. 505 (1983).

In *United States v. Schell*, the 10th Circuit reviewed the constitutionality of the use of the "preponderance of the information" standard of proof and recognized that the government "has legitimate interests in protecting society from an individual who is likely to engage in further criminal conduct—through incapacitation of the offender—and in deterring others like him." 692 F.2d at 678. Further, the court stated that:

> " 'the prime responsibility for rationalizing the penalty structure of the penal code must in the last analysis fall upon the legislature.' *ABA Standards, supra*, at 38. The preponderance standard inserted in section 3575(b) was a deliberate decision of Congress, a coordinate branch of government empowered by the Constitution to 'provide for the . . . general Welfare of the United States.' U.S.Const. art. I, § 8, cl. 1. The legislative history indicates that Congress was aware of the due process concerns—indeed the very arguments made here—and that it weighed these concerns. *See* H.R.Rep.No. 1549, 91st Cong., 2d Sess.

> (1970), *reprinted in* 1970 U.S.Code Cong. & Ad.News 4074-75 (statement of Rep. Dennis); *id.* at 4086-87 (statement of Reps. Conyers, Mikva and Ryan). We must, therefore, give great weight to its decision, *see Fullilove v. Klutznick*, 448 U.S. 448, 472, 100 S.Ct. 2758, 2771, 65 L.Ed.2d 902 (1980), and we are reluctant to say that Congress' balancing of those interests was incorrect."

Id. at 679. We agree with this analysis.

Scarpelli also urges this court to re-examine our earlier *United States v. Neary*, 552 F.2d 1184 (7th Cir.), *cert. denied*, 434 U.S. 864 (1977) decision, wherein this court rejected a due process challenge to the preponderance of the information standard enunciated in § 3575(b).[2] We note that the defendant

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[2] In *United States v. Neary*, the court's decision and analysis was limited to the preponderance of the information standard as applied to the question of whether a defendant met one of the two determinations required before an increased sentence can be imposed. These determinations are (1) whether the defendant is a "special offender" as defined in 18 U.S.C. § 3575(e), and (2) whether the defendant is "dangerous" as defined in § 3575(f). A finding of "special offender" status "involves historical facts, either prior convictions (under (e)(1)[)] or the character and concomitants of the offensive conduct (under (3)(2) and (3))." *Neary*, 552 F.2d at 1193. A finding that a defendant is dangerous "involves both evaluation of the character of the defendant and a prediction of future conduct, matters which are traditionally left to [the] wide discretion of a sentencing court." *Id.* The panel upheld the preponderance of the evidence standard as used to find a defendant "dangerous" under § 3575(f). The *Neary* court did not reach the question of whether the preponderance of the evidence standard would be a constitutionally valid means of finding a defendant a "special offender" under § 3575(e). It should be pointed out that two of the panel members were of the opinion that "serious due process questions" existed concerning the use of the preponderance of the evidence standard to find a defendant a "special offender" under § 3575(e). *Id.* at 1195. This dicta is no longer significant, however, as our court later upheld the preponderance standard without reservation in *United States v. Inendino*, 604 F.2d 458 (7th Cir. 1979).

has failed to provide a convincing argument much less any case law which compels us to reconsider our holding in *United States v. Neary* and our later decision in *United States v. Inendino.*[3] Furthermore, the five other circuits that have addressed the question of the constitutionality of the preponderance of information standard of proof have found it to be constitutional. We agree and, in reaffirming our previous decisions, hold that the preponderance of information standard of proof embodied in 18 U.S.C. § 3575(b) is a constitutionally valid procedure to be used in the determination of whether a defendant should be designated and sentenced as a dangerous special offender.

III.

Scarpelli next contends that the sentencing court erred in failing to articulate specific reasons in support of its findings that the defendant was not only a "special offender" but also a dangerous offender" prior to its invocation of § 3575's enhanced sentencing provision. The statute defines "special offender" and "dangerous offender" separately:

> "(e) A defendant is a special offender for purposes of this section if—
>
> "(1) the defendant has previously been convicted . . . for two or more offenses committed on occasions

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[3] Scarpelli relies on *United States v. Duardi*, 384 F. Supp. 874 (W.D. Mo. 1974), *aff'd. on other grounds*, 529 F.2d 123 (8th Cir. 1975), which found that the preponderance of the information standard unconstitutional and that the statute's definition of "dangerousness" was unconstitutionally vague. The significance of *Duardi* as authority for the defendant's argument is diminished by *United States v. Cox*, 719 F.2d 285 (8th Cir. 1983) where the Eighth Circuit held that section 3575(f) was not unconstitutionally vague and stated that "[w]e, therefore, agree with the Fourth, Fifth, Sixth, Seventh, and Tenth Circuits in upholding the constitutionality of the Dangerous Special Offender Statute." *Id.* at 287. The court, however, did not specifically discuss the preponderance of the information standard.

> different from one another and from such felony and punishable in such courts by death or imprisonment in excess of one year, for one or more of such convictions the defendant has been imprisoned prior to the commission of such felony, and less than five years have elapsed between the commission of such felony and either the defendant's release, on parole or otherwise, from imprisonment for one such conviction or his commission of the last such previous offense or another offense punishable by death or imprisonment in excess of one year . . . ."
>
> * * *
>
> "(f) a Defendant is dangerous for purposes of this section if a period of confinement longer than that provided for such felony is required for the protection of the public from further criminal conduct by the defendant."

18 U.S.C. § 3575(e)(1) and (f).

While the defendant concedes that the same evidence can form the basis for a finding that an individual is both a "special offender" and a "dangerous offender," he argues that "the statute requires the sentencing court to assess *independently* whether the defendant satisfies both criterion." For this proposition he relies on *United States* v. *Ilacqua*, 562 F.2d (6th Cir. 1977), *cert. denied*, 435 U.S. 906, 917, 947 (1978). An examination of *Ilacqua* clearly indicates that the defendant's reliance is misguided. The Sixth Circuit in *United States* v. *Ilacqua* simply did not discuss the question of whether or not the sentencing court was required to independently address the "dangerous" and "special" offender criteria in relation to a particular defendant. That case merely concerned the adequacy of the "notice" the prosecutor was required to file with the sentencing court under § 3575(a) to invoke the sentencing provisions of the dangerous special offender statute. 562 F.2d at 403. Under the statute that "notice" must set "out with particularity the reasons why [the prosecuting] attorney believes the defendant to be a dangerous special offender." 18

U.S.C. § 3575(a)(2). In essence, without providing this court with any legal support, the defendant requests us to establish a rule of law requiring trial courts to separately articulate their reasoning as to both the "special offender" and the "dangerous offender" criteria. It is important to note that the statute does not mandate this degree of specificity; rather it only requires the court to "place in the record its findings, including an identification of the information relied upon in making such findings, and its reasons for the sentence imposed." 18 U.S.C. § 3575(b). We conclude that under the statute a court is not required to independently delineate its reasoning in finding a defendant both a "special offender" and a "dangerous offender" and therefore we hold the defendant's contentions to be without merit.[4]

Turning to a review of the adequacy of the sentencing court's findings, the defendant clearly fell within the statutory definition of a "special offender." The record contains certified copies of the defendant's three separate and distinct prior felony convictions, and the presentence report indicates he spent time incarcerated on at least one of those convictions. Furthermore, less than five years elapsed between his last felony conviction for which he was imprisoned and his current conviction. Based on the foregoing, beyond doubt the defendant was a "special offender" within the parameters of dangerous special offender statute. As explained by the Tenth Circuit, to determine that a defendant is a "special offender" under § 3575(e)(1) the court must find:

> "certain historical facts about defendant's past record that are easily verifiable: that defendant has been previously convicted of at least two felonies committed on different

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[4] While we find no requirement of specific findings as to both "special" and "dangerous" offender criteria, we do believe that trial courts should make a concerted effort to articulate and delineate their findings as clearly as possible to afford effective review by appellate courts, and to insure that individuals sentenced under § 3575 are adequately appraised of the reasons for such sentencing.

> occasions (and is now convicted of another on a different occasion); that defendant has been imprisoned on at least one of the prior felonies; and that less than five years have elapsed between commission of the felony now before the court and commission of the last prior felony or defendant's release from prison for one of the prior convictions."

United States v. Schell, 692 F.2d at 678 (10th Cir. 1982) (citing 18 U.S.C. § 3575(e)(1)). Clearly these requirements are met here. In this regard, the trial court in the present case stated:

> "The things that impressed me unfavorably, I might say, in making me feel that the defendant is a special dangerous offender is the fact that he has not two but three prior convictions, two of them particularly serious . . . .
>
> * * *
>
> "I think the three prior convictions are sufficient to justify the sentence in view of the circumstances of the crime and the background of the defendant in this particular case."

While the sentencing court did not make a specific finding concerning the question of whether the defendant was "dangerous" within the meaning of the statute, a reading of the transcript of the sentencing hearing clearly demonstrates that the trial court in fact considered Scarpelli's three prior convictions, in conjunction with the defendant's current conviction, sufficient to find the defendant "dangerous" under § 3575(f). For example, immediately following the preceding quote, the trial court stated:

> "[W]ithout anything more, a seven-year sentence would be consistent with the objectives of the statute and with the nature of the offense, in other words not disproportionate in severity to the maximum term otherwise authorized by law for the felony."

The court then reiterated this belief later in his discussion.

> "If I ignore all of the statements or stipulations that I have already mentioned, I think that there is sufficient

> evidence or adequate—more than adequate evidence in the record to impose an additional two years over the maximum for the crime in which he has pleaded guilty and likewise that that should be consecutive to the sentence which he is now serving in state custody."

Thus, as both the "special" and "dangerous" offender criteria were met, the court was justified in invoking the provisions of the dangerous special offender statute in its sentencing of Scarpelli to an additional two years over the maximum provided for his current conviction. In *United States v. Ilacqua*, 562 F.2d 399 (6th Cir. 1977), the court noted in its discussion of the notice requirements of the statute that "the same evidence may establish that a defendant is both a special and dangerous offender . . . ." *Id.* at 403. *See also, United States v. Warme*, 572 F.2d 57, 61 n.4 (2d Cir.), *cert. denied*, 435 U.S. 1011 and 439 U.S. 986 (1978). In support of this statement, the court in *Ilacqua* pointed out that:

> "As the Senate Report concluded, '"[d]angerousness" may be inferred, *although not necessarily*, from the establishment of the requirements of subsection (e) [special offender status].' S. Rep. 91-617, 91st Cong., 1st Sess. 166 (1969) (emphasis added)."

562 F.2d at 403 (footnote omitted).

Pursuant to the case law and the Senate Report incorporated therein, the sentencing court in the instant case did not err in holding that the defendant was a "dangerous special offender" solely on the basis of his three prior, separate and distinct felony convictions. The trial court went on, however, to delineate certain information contained in the stipulations in further support of its conclusion. Those stipulations relied upon recite: 1) the expected testimony of an FBI agent, Michael Konkol, concerning the defendant's connection with a 1978 armored car robbery in Hammond, Indiana; 2) the expected testimony of John Cullotta, a convicted felon now in the Witness Protection Program, implicating the defendant in the

murder of Ned Bakes; 3) the expected testimony of John Forbes, another convicted felon in the Witness Protection Program, implicating the defendant in a series of burglaries and other criminal activity; and 4) the expected testimony of Lawrence W. Wagner concerning information (gained through his duties as police detective) implicating the defendant in a series of burglaries in LaGrange and Elmhurst, Illinois approximately ten to thirteen years prior to the sentencing hearing. This information clearly relates only to the defendant's "dangerousness" as it was obvious the defendant more than met the statutory definition of a "special offender" based upon the certified copies of his three prior felony convictions.

The preceding overview of the evidence demonstrates that the implicit "dangerousness" finding underlying the court's decision that the defendant was in fact a "dangerous special offender," was supported by more than substantial evidence. The court clearly determined that the defendant was an individual whose confinement for longer than that provided for the present felony conviction was "required for the protection of the public from further criminal conduct ...." 18 U.S.C. § 3575(f). "A finding of dangerousness under Section 3575(f) involves an evaluation of the defendant's character and a prediction of future criminal conduct, 'matters which are traditionally left to [the] wide discretion of a sentencing court.' " *United States v. Jarrett*, 705 F.2d 198, 208-9 (7th Cir. 1983), *cert. denied*, ____ U.S. ____, 104 S. Ct. 995 (1984) (quoting *United States v. Neary*, 552 F.2d at 1193). After a review of the record, we hold that the court's findings provide a proper basis for sentencing Scarpelli as a "dangerous special offender" and thus hold that the sentencing court did not abuse its discretion in sentencing the defendant under 18 U.S.C. § 3575.

IV.

The defendant finally argues that the sentencing court erred in finding him a dangerous special offender "based on hearsay of the type" contained in the stipulations, and that, in any event, the hearsay allegations provided an insufficient basis for the court's findings. With regard to the nature of the evidence which can be considered in the determination of dangerous special offender status, Congress specifically provided that:

> "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

18 U.S.C. § 3577. Our court recently recognized the broad scope of information which a court may consider in dangerous special offender sentencing proceedings:

> "Pursuant to Rule 1101(d)(3) of the Federal Rules of Evidence, the Rules do not apply in sentencing hearings. Thus, the Rules relating to hearsay do not apply. A judge may properly conduct a broad inquiry, 'largely unlimited either as to the kind of information he may consider, or the source from which it may come.' *United States v. Tucker*, 404 U.S. 443, 446, 92 S.Ct. 589, 591, 30 L.Ed.2d 592 (1972). Hearsay evidence is admissible in sentencing proceedings, including dangerous special offender proceedings. *United States v. Inendino*, 604 F.2d 458, 463 (7th Cir.), *cert. denied*, 444 U.S. 932, 100 S.Ct. 276, 62 L.Ed.2d 190 (1979)."

United States v. Jarrett, 705 F.2d 198, 208 (7th Cir. 1983). *See also United States v. Weston*, 708 F.2d 302, 309 (7th Cir.), *cert. denied*, ____ U.S. ____, 104 S. Ct. 397 (1983); and *United States v. Scalzo*, 716 F.2d 463, 469 (7th Cir. 1983).

The record demonstrates that the court carefully reviewed all of the stipulations and after weighing the same, only found four of the stipulations meritorious of consideration. It should

also be pointed out that the defendant freely entered into the stipulations considered by the court with regard to his sentencing, and had he not agreed to these evidentiary stipulations, he would have been entitled to a full and complete sentencing hearing. The record clearly shows that Scarpelli entered into the plea agreement of his own free will in an obvious effort to obtain a more lenient sentence. He was advised of his right to a full and complete sentencing hearing at the time he entered into the plea agreement and, in effect, waived both his right under § 3575 and the Constitution to the full hearing. In view of the wide discretion given to the sentencing court concerning the type of information it might consider during sentencing hearings, *United States v. Jarrett*, 705 F.2d at 208, we hold that the trial court in the present case did not abuse its discretion by basing its findings in part upon stipulations containing hearsay allegations.

We need not discuss further the defendant's argument concerning the alleged insufficiency of the evidence contained in the record to support a finding that the defendant was a "dangerous special offender." As we have previously held, the court's findings based on Scarpelli's prior criminal record and the four stipulations provided more than adequate justification for the court's finding that the defendant was in fact a "dangerous special offender" within the meaning of 18 U.S.C. § 3575. Considering the defendant's almost perpetual record of criminal activity, "a period of confinement longer than that provided for [his current conviction] is required for the protection of the public from further criminal conduct by the defendant." 18 U.S.C. § 3575(f). We must remember that "[w]e are not only concerned with the [defendant's] rights but also with the right of the general public to live free, unafraid and unmolested." *United States v. Madison*, 689 F.2d 1300, 1314 (7th Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S. Ct. 754 (1983).

We AFFIRM.

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

July 3, 1984

Before

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. THOMAS E. FAIRCHILD, Senior Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 83-2754 *vs.*
GERALD SCARPELLI,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois Eastern Division.

No. 83 CR 16
Thomas R. McMillen, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by the defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.